

T.C. Memo. 2000-70

UNITED STATES TAX COURT

MITCHELL G. MANN, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 17895-97.

Filed March 3, 2000.

Mitchell G. Mann, pro se.

James J. Posedel, for respondent.

MEMORANDUM OPINION

LARO, Judge: This case is before the Court fully stipulated. See Rule 122, Tax Court Rules of Practice and Procedure. Respondent determined a \$9,477 deficiency in petitioner's 1990 Federal income tax, additions thereto of \$1,119 and \$620 under sections 6651(a)(1) and 6654, respectively, and a

\$1,895 accuracy-related penalty under section 6662(a). Following respondent's concession that petitioner has no Federal income tax liability for 1990, we must decide whether petitioner may receive a refund for that year. We hold he may not. Unless otherwise indicated, section references are to the applicable versions of the Internal Revenue Code.

Background

Petitioner never filed a 1990 Federal income tax return. Respondent issued to petitioner a notice of deficiency for that year on May 21, 1997,¹ and petitioner, while he resided in San Diego, California, timely petitioned the Court to redetermine respondent's determinations shown therein.

On or about April 15, 1991, petitioner filed a Form 4868, Extension Of Time to File U.S. Individual Tax Returns, with the Commissioner and enclosed a \$5,000 payment. Petitioner later filed with the Commissioner a second request for an extension of time to file his 1990 tax return. The Commissioner granted both requests. On February 6, 1992, petitioner paid another \$25 towards his tax liability for 1990.

Discussion

Petitioner argues that he is entitled to a \$5,000 refund for 1990 because he tendered that amount to the Commissioner as a deposit. Respondent argues that petitioner tendered the \$5,000

¹ The parties stipulated incorrectly that the notice was issued on May 27, 1997.

to the Commissioner as a payment of tax for 1990, and, hence, that he may not receive a refund of any of that amount because it was paid more than 2 years before respondent issued the notice of deficiency.

We agree with respondent. Petitioner must demonstrate that his claim for refund is timely. See Flagg v. Commissioner, T.C. Memo. 1997-297. Although section 6512(b)(1) bestows jurisdiction on this Court to determine the existence and amount of any overpayment of tax to be refunded for a year before us, section 6512(b)(3)(B) prohibits us in this case from awarding a refund unless we determine that the refunded amount was paid "within the period which would be applicable under section 6511(b)(2) * * * or (d), if on the date of the mailing of the notice of deficiency a claim had been filed (whether or not filed) stating the grounds upon which the Tax Court finds that there is an overpayment".² See also Commissioner v. Lundy, 516 U.S. 235, 241-242 (1996). The relevant provision of section 6511(b)(2) provides that when a claim for refund is outside the 3-year period of section 6511(a), the amount of the refund may not exceed the amount of tax paid within the 2 years preceding the claim for refund. See sec. 6511(b)(2)(B). Section 6511(a) states that a claim for refund generally must be made within 3

² The Taxpayer Relief Act of 1997, Pub. L. 105-34, sec. 1282(a), 111 Stat. 788, 1037-1038, amended sec. 6513(b)(3) for years ending after Aug. 5, 1997.

years from the time the return was filed or if no return was filed by the taxpayer, within 2 years from the time the tax was paid.

Petitioner tendered the \$5,000 to the Commissioner with a Form 4868. The Court of Appeals for the Ninth Circuit, the court to which an appeal in this case lies, has held that a remittance to the Commissioner in such a situation is a payment of estimated tax and not a deposit. See Ott v. United States, 141 F.3d 1306 (9th Cir. 1998). We hold likewise. See Golsen v. Commissioner, 54 T.C. 742 (1970), affd. 445 F.2d 985 (10th Cir. 1971); see also Baral v. United States, ___ U.S. ___ (2000) (quarterly estimated tax payment was a payment of tax and not a deposit). Because petitioner's payment of the \$5,000 is considered paid on April 15, 1991, see sec. 6513(b)(2), petitioner is not entitled to receive a refund of any of that amount, see Commissioner v. Lundy, supra.

Decision will be entered
stating that there is no
deficiency, addition to tax,
or accuracy-related penalty
due from petitioner and there
is no overpayment due to
petitioner for 1990.